Supreme Court, U.S.
FILED

051626 JUN 20 2006

OFFICE OF THE CLERK

No. 05-

IN THE
Supreme Court of the United States

AHMAD-RUFAI ABDULLAH,

Petitioner,

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA – CONSTITUENT N.C. STATE UNIVERSITY AT RALEIGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROMALLUS O. MURPHY
Attorney for Petitioner
P. O. Box 20383
Greensboro, NC 27420-0383
(336) 273-1698

201843

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings on a summary judgment motion in a Civil Rights case by allowing the Court to make credibility assessments.

Whether Plaintiffs' witness statements accompanied by a certificate of acknowledgment executed in proper form by a Notary Public as authorized by State law should be considered in Plaintiff's response to Defendant's Summary Judgment Motion.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Petition	4
The Court Has Departed From The Accepted And Usual Course of Judicial Proceeding In A Matter of Exceptional Importance To The American Worker	4
Petitioner's Claim	4
Supporting Statements	7
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7

Cummings v. Standard Register Co., 265 F.3d 56, 87 F.E.P. Cases 1190 (1st Cir. 2001) 6

Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) 5

EEOC v. Sears, Roebuck & Co., 243 F.3d 846 (4th Cir.) 6

Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990) 7

Rhodes v. FDIC, 257 F.3d 373, 11AD Cases 1776 (4th Cir.) 6

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1746 7

42 U.S.C. § 2000e 1

N.C.G.S. § 10A-3 8

Cited Authorities

Page

Rules:

F.R.C.P. 56(c) 4

F.R.C.P. 56(e) 7

Federal Rules of Evidence 901 7

Federal Rules of Evidence 902 ..... 7, 8

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided March 22, 2006 ..... 1a

Appendix B — Order Of The United States District Court, Eastern District Of North Carolina Western Division Dated April 12, 2005 And Filed April 13, 2005 ..... 3a

OPINIONS BELOW

The Order and Judgment of the Court of Appeals affirming the District Court is produced in Appendix A. The Orders of the District Court are reproduced in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on March 22, 2005.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute involved is set forth below.

Section 706(f)(1), Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

STATEMENT OF THE CASE

This action was instituted by petitioner Ahmad Rufai-Abdullah on May 14, 2003, in the United States District Court for the Eastern District of North Carolina. Petitioner alleged that the respondent terminated his employment because of illegal discrimination on the basis of race and national origin, in violation of 42 U.S.C. § 2000e(5).

Petitioner is a trained veterinarian and public health consultant. He had two research appointments at North

Carolina State University between 1995 and 2001. Between 1992 and 1995, he completed a post-graduate clinical training (Residency).

North Carolina State University asked petitioner to initiate efforts to expand a USDA Food Safety program, USFARAD to parts of Africa. He initiated the program in 1996. The global program was named global FARAD (gFARAD). FARAD means Food Animal Drug Residue Avoidance Databank.

North Carolina State University, through Dr. Riviere, petitioner's supervisor, and petitioner, organized and initiated a technical assistance program that visits between the United States and Nigeria. A program was formulated to be funded by USDA through an interagency arrangement with USIAD. The effort culminated in Nigeria being invited to participate in gFARAD.

In December 2000, after submitting concept notes, Dr. Abdullah was asked to submit a formal proposal to ATRIP, due January 29, 2001. ATRIP is African Trade and Investment Policy (ATRIP) program, a USAID program administered through several United States agencies, including USDA. It is a $500,000 to $1.5 Million grant for three years under a United States Government-to-Government assistance initiative. Petitioner immediately informed his Chair and Director and worked on the pre-proposal throughout Christmas 2000 and the New Year holiday in 2001, along with faculty at North Carolina State University, Tuskegee, a Nigerian University and the USDA. This was submitted and accepted and formal application forms were sent from USDA to North Carolina State University.

Petitioner's Director began efforts to end petitioner's participation in the program on January 23, 2001. Dr. Riviere tried to get petitioner fired immediately or have his contract bought out prior to its ending date.

Petitioner's witness, Dr. Ronald Baynes, supported petitioner's contention that Dr. Riviere wanted to terminate petitioner and considered options to accomplish his goal.

Petitioner's work at US/FARAD at North Carolina State University was closed and Nigeria was dropped from gFARAD on January 29, 2001. Petitioner was reprimanded and later removed from the Center. Fortunately, USDA/USAID liked petitioner's pre-proposal and wanted to fund it in a formal granting process through North Carolina State University's Office of Sponsored Programs in a bilateral agreement. Because of law and in accordance with North Carolina State University's faculty guidelines and petitioner's job description, petitioner was allowed to seek and apply for extramural funding.

Dr. Abdullah's Chair sent him a letter dated September 26, 2001, terminating his employment. He would not get another year, even though he had a grant that included his salary for half the renewal period. Bridge money could have been provided.

The College of Agriculture and Life Sciences refused to consider and acknowledge bridge funding while new funding initiatives were unfolding. Bridge funding is provided to professors when their grant funding runs low. Dr. Stacy Branch, an African American, recited how she was isolated and treated differently because of her race in the College of Agriculture and Life Sciences (Dr. Branch Affidavit). When Dr. Jim Riviere shut down the FARAD program, he acknowledged the existence of bridge funding.

The District Court granted Summary Judgment in favor of the respondent (Appendix A). The case was affirmed by the United States Court of Appeals for the Fourth Circuit. Notarized supportive statements by petitioner's witnesses were not considered by the Court in ruling on petitioner's Summary Judgment Motion.

REASONS FOR GRANTING THE PETITION

THE COURT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING IN A MATTER OF EXCEPTIONAL IMPORTANCE TO THE AMERICAN WORKER.

The standard for summary judgment requires that judgment be granted for the movant if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.C.P. 56(c).

PETITIONER'S CLAIM

Petitioner's showing sets forth facts demonstrating that prior to his contract expiration, Dr. Riviere specifically called for the removal of petitioner from the work place. Other evidence of Dr. Riviere's animosity towards petitioner is reflected in statements to Dr. Ron Baynes, petitioner's witness, in email exchanges.

There was no evidence or claim that because petitioner was working on a food safety proposal, he was not fulfilling his responsibilities. The food safety proposal ended on January 23, 2001, when the University ended its support.

Complaints about not doing assigned duty was made by Dr. Riviere, when he posed the question "How can I get him out of here?"

It should be noted that the University did not need to look for funds to renew petitioner's contract because petitioner had more than half of the funds needed to continue working. Moreover, Dr. Riviere acknowledged the existence of bridge funding when he closed the gFARAD program.

Petitioner's evidence demonstrates that Dr. Riviere harbored a discriminatory motivation to remove petitioner from his position. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). Dr. Ronald Baynes, a Black professor, submitted an affidavit for respondent significantly different from his e-mails to petitioner. There he recites a discriminatory atmosphere and referenced the College as Bob Jones University. Dr. Riviere, in paragraph 12 of his Affidavit, states:

> I had no involvement in the decision not to reappoint Abdullah. If Dr. Floyd or someone else had obtained funding for Abdullah, they could have reappointed him in another department or center. To my understanding, Dr. Floyd allowed Abdullah's appointment as a Research Lecturer to expire and agreed to let Abdullah serve as a contractor through December 2001 to complete a USDA/FAS Agreement for the development of a Nigerian Food Safety and Security Policy Initiative. After the expiration of Abdullah's appointment, I did not fill the position of research lecturer or research associate within the Center. In fact, during the next year, existing technicians

> in the Center performed the animal surgeries. When the funding was reestablished for FARAD in July 2002, restructured the positions in the Center. We hired a research technician to perform the animal surgeries in 2003, and a Research assistant Professor in the fall of 2002 to perform FARAD tasks and other research duties. These positions were filled by a White American and a White South African respectively.

This statement demonstrated that FARAD continued to exist. Notwithstanding petitioner's initiative at securing funds to continue employment, no effort was made to support petitioner's continued employment. On one hand, respondent is suggesting petitioner had a performance issue. On the other hand, he was terminated because of the lack of funding. This changing of reasons provide a reason for a jury to conclude that the stated reasons were pretextual. *Cummings v. Standard Register Co.*, 265 F.3d 56, 87 F.E.P. Cases 1190 (1st Cir. 2001). *EEOC v. Sears, Roebuck & Co.*, 243 F.3d 846 (4th Cir.).

The District Court, on pages 10 and 11 of its Opinion, disregarded petitioner's contentions and concluded that petitioner failed to make a prima facie case of discrimination. To reach this conclusion, the Court made a credibility assessment by drawing inferences in favor of the respondent. *Rhodes v. FDIC*, 257 F.3d 373, 11 AD Cases 1776 (4th Cir.).

A Court, in entertaining a motion for judgment as a matter of law, should review all of the evidence in the record. In doing so, however, the Court must draw all reasonable inferences in favor of the nominating party, and it may not

make credibility determinations or weigh evidence. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Libe y Lobby, supra* at 255.

SUPPORTING STATEMENTS

Appellant contends that supporting statements submitted by Dr. Stacy Branch, Patricia Figgures and Dr. Cecil Brown should be admitted and considered in support of Appellant's claim.

Rule 56(e) of the Federal Rules of Civil Procedure (Rule 56(e)) provides that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e).

To be admissible, a document must be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Federal Rules of Evidence 901(a). Authentication may be made, for example, by the testimony of a witness with knowledge. Fed. R. Evid. 901(b)(1). A document is considered "self-authenticating" and does not need additional evidence to support its identity if it is a "declaration that satisfies 28 U.S.C. § 1746." Fed. R. Evid. 902, Advisory Committee's Note (2000). Additionally, a document "accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements" is considered "self-authenticating." Fed. R. Evid. 902(8).

Pursuant to N.C.G.S. § 10A-3, the following definitions are applicable:

(1) Acknowledgement – a notarial act in which a notary certifies that a signer, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has admitted, in the notary's presence, having signed a document voluntarily.

(9) Verification or Proof – A notarial act in which a notary certifies that a signer whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has, in the notary's presence voluntarily signed a document and taken an oath or affirmation concerning the document.

Pursuant to Fed. R. Evid. 902(8), the three statements should be considered in support of Petitioner's claims. The Court did not strike the statements, but they were not considered in response to the summary judgment motion.

CONCLUSION

The case presents a question of exceptional importance – whether a litigant can be denied his day in court when factual issues of intent and motive are involved and controverted. The federal court must assure litigants that the right to a jury trial is protected. In this instance, a litigant is denied his day in court.

Respectfully submitted,

ROMALLUS O. MURPHY
Attorney for Petitioner
P. O. Box 20383
Greensboro, NC 27420-0383
(336) 273-1698

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 22, 2006

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-1552

AHMAD-RUFAI ABDULLAH,

Plaintiff - Appellant,

versus

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; NORTH CAROLINA STATE UNIVERSITY, NC State University at Raleigh,

Defendants - Appellees.

Submitted: March 13, 2006 Decided: March 22, 2006

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (CA-03-360-5)

Before WILKINSON, WILLIAMS, and SHEDD, Circuit Judges.

Appendix A

PER CURIAM:

Ahmad-Rufai Abdullah appeals the district court's order granting summary judgment to Defendants in Abdullah's employment discrimination suit. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Abdullah v. Board of Governors of the Univ. of North Carolina*, No. CA-03-360-S (E.D.N.C. Apr. 13, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION DATED APRIL 12, 2005 AND FILED APRIL 13, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:03-CV-360-BR(3)

AHMAD-RUFAI ABDULLAH,

Plaintiff,

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA CONSTITUENT N.C. STATE UNIVERSITY AT RALEIGH,

Defendant.

ORDER

Defendant North Carolina State University's (the University) motion for summary judgment and motion to strike are before the court.

On 14 May 2003, plaintiff Dr. Ahmad-Rufai Abdullah, a black Nigerian, (Compl. ¶¶ 1, 4),[1] filed a complaint alleging

1. In his affidavit, plaintiff describes himself as an African-American. (Pl.'s Aff. ¶ 1.) Because plaintiff asserts discrimination based on national origin, however, the court will assume, for purposes of this motion, that his statements in the Complaint, that he is a "black Nigerian" and a "foreign national," are accurate. (Compl. ¶¶ 4, 8.)

discrimination based on race and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e (5) *et seq.*, and 42 U.S.C. § 1981. On 9 January 2004, this court entered an order granting in part and denying in part a motion to dismiss filed by the University. The court allowed the University's motion to dismiss plaintiff's § 1981 claim and his claim for punitive damages under Title VII. The court also allowed the motion to the extent plaintiff alleged and sought to recover on the basis of general disparate treatment or retaliation predating the date of plaintiff's formal EEO charge, but denied the University's motion to dismiss plaintiff's claim alleging discriminatory termination in violation of Title VII. Accordingly, only plaintiff's Title VII action for discriminatory termination remains.

On 20 January 2004, the University filed an answer. On 20 October 2004, the University filed a motion for summary judgment with an accompanying memorandum, and plaintiff filed a response on 13 December 2004. On 3 January 2005, the University filed a reply along with a motion to strike three letters submitted in conjunction with plaintiff's response. Plaintiff filed a response to the motion to strike on 24 January 2005. The University did not file a reply. The motions are ripe for review.

I. Facts

Plaintiff began working as a Research Associate for the Center for Chemical Toxicology Research and Pharmacokinetics (the Center) within the College of Veterinary Medicine at the University in 1995, (Compl. ¶ 8a; Riviere Aff. ¶¶ 4-5), and he continued to work for the

University pursuant to fixed-term contracts or appointments through September 2001, (Compl. ¶ 8j; Fletcher Aff. ¶ 10; Riviere Aff. ¶ 7). Plaintiff's appointments were explicitly "contingent on the availability of funds in accordance with the University of North Carolina Board of Governors' policies and NCSU Board of Trustees Employment policies for University Employees exempt from the State Personnel Act." (Fletcher Aff. ¶ 9; Riviere Aff. ¶¶ 5-7.)

As a Research Associate for the Center, plaintiff worked under the supervision of Dr. Jim Riviere, a white American male and Director of the Center since 1989. (Riviere Aff. ¶ 1.) During the several years that plaintiff worked for the Center, he was responsible for animal surgery and in vivo animal studies as well as the development of in vitro and in vivo experimental models for use in dermatologic and toxicologic research. (Riviere Aff. ¶ 4.) At Dr. Riviere's suggestion, plaintiff was promoted in November 1999 to the position of Research Lecturer. (Riviere Aff. ¶ 9.) His responsibilities remained the same for the most part, but Dr. Riviere asserts that plaintiff's responsibilities expanded at that time to include interaction with the Food Animal Residue Avoidance Databank (FARAD) program. (Id.) FARAD, a collaborative project between NCSU and the Universities of California-Davis and Florida-Gainesville, is a USDA-supported drug database project designed to provide information on food safety to veterinarians across the United States. (Riviere Aff. ¶ 8.) Dr. Riviere was one of three Directors of the FARAD program. After plaintiff's promotion, he was instructed to spend about 75% of his time on animal-related projects, including surgery and in vivo work, and general Center functions, including gathering

abstracts for Dr. Riviere, and about 25% on FARAD related work, including answering telephonic questions. (Riviere Aff. ¶ 9.) Dr. Riviere also told plaintiff he could spend any additional time working on a paper for publication about PCP tissue concentration in pigs. (Id.)

While Dr. Riviere suggests that plaintiff began FARAD work in 1999, plaintiff maintains that he was asked by the University, as early as 1996, to initiate efforts to expand FARAD to parts of Africa. (Pl.'s Aff. ¶ 2.) The global program was called gFARAD. (Id.) Between 1996 and 1999, when plaintiff became formally associated with FARAD, Dr. Riviere "corresponded directly with the persons that [plaintiff] had identified for him in Nigeria and got [plaintiff] to actively seek their membership. This engagement between gFARAD and the Nigerian institution culminated in his inviting a Nigerian delegation (at Ministerial level) to visit NCSU in August 2000." (Pl.'s Resp., Ex. 6 (Resp. to Interrogatories at 4).) Other exhibits submitted by plaintiff, including letters to and from Nigerian officials, support his contention and suggest that Nigeria was involved in the organizing committee of gFARAD as early as February of 1997 and that plaintiff was instrumental in securing Nigeria's participation. Plaintiff's exhibits show that his promotion constituted the formalization of his relationship with FARAD rather than the creation of that relationship.

Dr. Riviere once again supported plaintiff's reappointment as a Research Lecturer for the October 2000 to September 2001 contract year. (Riviere Aff. ¶ 10.) As in previous years, plaintiff's contract specified that his appointment was contingent on the availability of funds and

that it could be terminated upon the expiration of funds without further notice. (Id.) Subsequent to plaintiff's reappointment, Dr. Riviere learned that FARAD funding was diminishing and determined that public FARAD access would have to be closed and that the expansion of the gFARAD project under consideration would have to be postponed. (Riviere Aff. ¶ 10.) Dr. Riviere shut down the FARAD phones in January 2001. (Id.)

Meanwhile, plaintiff had been working towards including Nigeria formally within gFARAD and, allegedly without Dr. Riviere's knowledge, had been developing a proposal for a food safety project in Nigeria during the last few months of 2000. This particular project appears to have grown out of a conference held in August 2000 with representatives from Nigeria, representatives from the USDA, and individuals from the University. Although plaintiff has submitted emails pertaining to the Nigerian project exchanged between August 2000 and January 2001, with Barrett Slenning, the interim head of the Department of Food Animal Health and Resource Management (FAHRM), and Oscar Fletcher, the Dean of the College of Veterinary Medicine from 1992-2004, (Pl.'s Resp., Ex. 4, exs. 11A, 11C[2]), Dr. Riviere allegedly did not learn of plaintiff's efforts to create a Nigerian food safety program until early 2001, (Floyd Rebuttal Aff. ¶ 4; Riviere Aff. ¶ 10). Dr. Riviere was very upset when he learned of plaintiff's activities, which he claimed were not within

2. Plaintiff's exhibits are compiled in a somewhat confusing manner and often bear two exhibit numbers. In an attempt to be clear about the exhibit it is referencing, the court will provide citations to both exhibit numbers for a given document where applicable.

the purview of the Center's mission or funding or plaintiff's job description, (Riviere Aff. ¶ 10; Pl.'s Resp., Ex. 7, ex. 17.) Dr. Riviere also expressed concern that, because of plaintiff's work on the food safety project, he was not fulfilling the responsibilities he was required to fulfill in the context of his position at the Center. (Fletcher Aff. ¶ 7; Riviere Aff. ¶ 11.)[3]

Dr. Riviere issued plaintiff an official reprimand for failure to adhere to his directives on 7 February 2001. In April 2001, at Dr. Riviere's request, (Riviere Rebuttal Aff. ¶ 5; Pl.'s Resp., Ex. 16), plaintiff was removed from his position with the Center to a position under the supervision of Dr. James Floyd, Professor and Chair of the FAHRM Department, (id.; Riviere Aff. ¶ 11). According to Dr. Riviere, the Nigerian food safety project that plaintiff had been developing was not associated with the Center or FARAD, (Riviere Aff. ¶ 10), but it was not inconsistent with the activities of FAHRM, now known as the Department of Population Health and Pathobiology (DPHP). Under Dr. Floyd's supervision, plaintiff continued to work on the Nigerian food safety project seeking funding from the USDA/ Foreign Agricultural Service (FAS).

---

3. In his response to interrogatories, plaintiff asserted that he kept Dr. Riviere informed since September 2000 about "USDA's desire to help Nigerian agriculture as part of government to government aid. He stopped my 2001 $1.4 million dollar grant to USAID/USDA because of his desire to apply for the same type USAID grant down the road and that my grant would jeopardize his chances." ((Pl.'s Resp., Ex. 6 (Pl.'s Resp. to Interrogatories at 4).) To the extent that plaintiff has accurately characterized Dr. Riviere's intentions, such a motivation would undercut any inference of discriminatory animus.

Appendix B

As plaintiff's contractual term of employment drew to a close, Dr. Floyd elected not to renew plaintiff's appointment because there was no continuing position available in DPHP and because DPHP did not have the funding to support plaintiff. (Floyd Rebuttal Aff. ¶ 5.) Floyd also determined in consultation with Dean Oscar Fletcher, that there were no other available sources of funding, (Fletcher Aff. ¶ 9), and that there was not a place for plaintiff at the Center, (id. ¶¶ 11, 14, 16). On 26 September 2001, plaintiff received a letter from Dr. Floyd stating that his appointment would not be renewed and that his position would therefore end effective 30 September 2001. (Floyd Rebuttal Aff. ¶ 5.) Floyd explained to plaintiff that there was no funding from the Center, FARAD or DPHP to support the renewal of plaintiff's position. The University continued to employ plaintiff as a contractor, however, through and including December 2001, and paid him during that time with the remaining monies obtained from the grant plaintiff received for his Nigerian food safety project. (Id. ¶ 4.) Plaintiff believed the non-renewal of his contract was motivated by discriminatory animus based on his race and national origin, and he instituted proceedings with the EEOC. After receiving a right-to-sue letter from the EEOC, plaintiff filed this lawsuit against the University.

After the expiration of plaintiff's appointment, Dr. Riviere elected not to fill the position of Research Associate or Research Lecturer within the Center. (Riviere Aff. ¶ 12.) When funding for FARAD was reestablished in July 2002, Dr. Riviere restructured the positions in the Center and proceeded to hire a white American Research Technician to perform animal surgeries in 2003 and a white South African

Research Assistant Professor in the Fall of 2002 to perform FARAD tasks and other research duties. (Riviere Aff. ¶ 12.) Plaintiff did not apply for either of the foregoing positions.

II. Standard of Review

Summary judgment is appropriate in those cases in which there is no genuine dispute as to a material fact, and in which it appears that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Haavistola v. Community Fire Co. of Rising Sun. Inc.*, 6 F.3d 211, 214 (4th Cir. 1993). Summary judgment should be granted in those cases "in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." *Id.* In making this determination, the court draws all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

III. Title VII Claims

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . . race . . . or national origin; . . . ." 42 U.S.C. § 2000e-2(a)(1).

Appendix B

The Fourth Circuit has emphasized that a

> plaintiff may establish a claim of discrimination by demonstrating through direct or circumstantial evidence that . . . discrimination motivated the employer's adverse employment decision. The employee, however, need not demonstrate that the prohibited characteristic was the sole motivating factor to prevail, so long as it was a motivating factor. In such cases, historically referred to as "mixed-motive" cases, it is sufficient for the individual to demonstrate that the employer was motivated to take the adverse employment action by both permissible and forbidden reasons.

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 285 (4th Cir. 2004) (referencing *Desert Palace Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) regarding use of circumstantial evidence in mixed motive cases), cert. dismissed, __ U.S. __, 121 S. Ct. 1115 (Jan. 25, 2005).[4]

---

4. Plaintiff contends in his brief that there is "direct evidence of discrimination. Dr. Riviere specifically called for the removal of plaintiff long before the alleged contract expiration. PL' s Decl. ¶ 9. Ex. 8; ¶ 17, Ex. 16. Clearly plaintiff's evidence demonstrates that Dr. Riviere harbored a discriminatory motivation to remove plaintiff from his position." (Pl.'s Resp. at 3.) To the contrary, Dr. Riviere's request that plaintiff be removed fiom the Center, supported by several legitimate, nondiscriminatory reasons pertaining to plaintiff's work for the Center and preceded by years of support for the renewal of plaintiff's numerous appointments with the Center and promotion with the Center, provides neither direct nor circumstantial evidence of discriminatory nonrenewal, particularly where the actual decision not to renew plaintiff's contract was made by a different individual in an entirely different department.

Appendix B

The *Hill* court explained that a plaintiff may also avert summary judgment by proceeding under the traditional *McDonnell Douglas* framework, pursuant to which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination. *Id.* See also *Love-Lane v. Martin*, 355 F.3d 766, 786 (4th Cir. 2004) ("Although the evidentiary burdens shift back and forth under the *McDonnell Douglas* framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, . . . (1981). See also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, . . . (2000)."), cert denied, __ U.S. __, 125 S. Ct. 49 (2004).

Here, to establish a prima facie case of discriminatory non-renewal of his contract,[5] plaintiff must show that (1) he is a member of a protected class; (2) that he was qualified for his job and his job performance was satisfactory; (3) that, in spite of his qualifications and performance, he was fired; and (4) that the position remained open to similarly qualified applicants after his dismissal. See *Karpel v. Inova Health System Services*, 134 F.3d 1222, 1228 (4th Cir. 1998).

---

5. While plaintiff's complaint also contains allegations that Dr. Riviere denied plaintiff publishing opportunities, the ability to attend professional conferences, and the ability to procure grants, none of these were pertinent to Dr. Floyd's ultimate decision not to renew plaintiff's contract for lack of funding. (Floyd Aff. ¶¶ 12, 14.) As such, these complaints are outside the scope of the Title VII discriminatory non-renewal claim remaining in this action.

Appendix B

Because this case involves the non-renewal of a contract as opposed to an actual termination, the prima facie case could also be stated as follows: evidence that (1) plaintiff was a member of a protected group, (2) he was meeting the legitimate expectations of his employer, (3) he suffered an adverse employment action, and (4) there are facts that permit an inference of discrimination. See, e.g., *Cherry v. Ritenour School Dist.*, 361 F.3d 474,478 (8th Cir. 2004). See also *Smith v. University of North Carolina*, 632 F.2d 316, 340 (4th Cir. 1980) (defining elements of prima facie case in the context of non-renewal of appointment of assistant professor as follows: "(1) That the plaintiff belonged to a disadvantaged class or to a racial or religious minority; (2) That the plaintiff sought and was qualified for reappointment or promotion; (3) That the plaintiff was not reappointed or promoted; and (4) That, ill the case of reappointment, the college sought applicants to fill the position from persons of plaintiff's qualifications; or, in the case of promotion, the employer had promoted other persons possessing similar qualifications at approximately the same time.").

Here, as a black Nigerian, plaintiff falls within protected groups on the basis of race and national origin. It is undisputed that the University elected not to renew his contract in September 2001 and that the non-renewal of his contract could be considered an adverse employment action. With respect to whether he was meeting the legitimate expectations of his employer, the evidence submitted shows that Dr. Floyd, as the head of DPHP, made the decision not to reappoint plaintiff based on a lack of funding for the appointment and not for any reason associated with his performance. To the extent that the Center (i.e., Dr. Riviere)

did not support the renewal plaintiff's appointment, the evidence shows that Dr. Riviere had plaintiff removed from his position at the Center because plaintiff was working on projects outside the scope of the Center's funding and was also failing to attend to his regular responsibilities for the Center. (See Pl.'s Resp., Ex. 7, ex. 17 (23 January 2001 memo from Dr. Riviere to plaintiff expressly disapproving plaintiff's project and stressing need for plaintiff to focus on Center projects); Ex. 10, ex. 22 (23 January 2001 letter from Dr. Riviere to plaintiff regarding elimination of plaintiff's FARAD responsibilities and directive to work on Center-related functions); Ex. 16 (20 March 2001 email from Dr. Riviere to Dean Fletcher referencing plaintiff's refusal to perform assigned tasks and the need to remove him from the Center); Det's Mtn., Floyd Aff., Attach. 1 (1 February 2001 letter from Dr. Riviere to plaintiff conveying official reprimal). Dr. Riviere also communicated to plaintiff his belief that proceeding with the Nigerian food safety project under the auspices of gFARAD at that time would compromise the work then underway seeking financial stability and permanence for FARAD itself. (Pl.'s Resp., Ex. 7, ex. 17 and Ex. 10, ex. 22.) Plaintiff has not denied these facts but rather has offered various explanations as to why he did not perform his assigned tasks and for his perseverance on a project specifically disapproved by his supervisor. Accordingly, because he could not show that he was meeting Dr. Riviere's legitimate expectations, plaintiff would fail to make out a prima facie case to the extent he sought to base his discrimination action on any pre-termination decision made by Dr. Riviere or upon Dr. Riviere's decision not to support his reappointment with the Center for the 2001-02 contract year.

Appendix B

To give rise to an inference of discrimination, plaintiff may make an adequate showing by establishing, under *Karpel*, that his position remained open to similarly qualified applicants after his dismissal, or, under *Smith*, that the University sought applicants to fill the position from persons of plaintiff's qualifications outside the protected class. Because of the lack of funding in 2001, the University and more specifically, DPHP and the Center, did not seek to fill plaintiff's position. It would appear, therefore, that plaintiff could not establish a prima facie case of discrimination. Plaintiff asserts that the fact that Dr. Riviere hired a white American and a white South African in the Fall of 2002 when the FARAD program was re-funded, approximately one year after plaintiff's appointment expired, is sufficient to establish a prima facie case.

Even assuming plaintiff could establish a prima facie case on that basis, however, the University has articulated a legitimate non-discriminatory reason for its decision, the lack of available funds to support the renewal of the position. (Floyd Aff. ¶¶ 6-8, 10, 12.) The possibility that funding would expire was specifically mentioned in plaintiff's letter of appointment. To survive summary judgment, plaintiff must therefore show that the University's stated reason for its decision was pretextual, that it was not true and that it was offered as a pretext for the University's true discriminatory motive, and plaintiff is unable to do so.

At the outset it is important to note that an individual's subjective belief that he has been discriminated against is not sufficient to establish a material question of fact concerning his employer's motive. See *Evans v. Technologies Applications & Services, Co.*, 80 F.3d 954, 960

(4th Cir. 1996) (unsupported speculation insufficient to support a claim of discrimination); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir. 1989) ("a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action"). Plaintiff has asserted in his affidavit that in January 2001 when his pre-proposal regarding the food safety project was accepted, "the politicking [sic] to stop me and my grant application began, as my director began to pull at strings to stop a minority and a foreigner from having control of such a huge amount of grant money and the attendant power that comes with it. He even tried to get me fired immediately or have me bought out of my 2000-2001 employment contract, etc." (Pl.'s Aff. ¶ 8.) The proposition that Dr. Riviere took the actions he did because plaintiff was a minority and a "foreigner" are purely speculative, are not supported by the evidence, and are not sufficient to counter the University's stated rationale for its nonrenewal decision.

The University has presented affidavit testimony from Dr. Floyd that plaintiff's race and national origin played no part in his decision. (Floyd Aff. ¶ 12.) Dr. Floyd also provided testimony that at least three white Americans under his supervision were not reappointed due to lack of funding.[6]

---

6. The University has also offered sworn testimony that Dr. Floyd hired three tenure track faculty: a black Ethiopian male, a Brazilian male, and a white American female, and also supported the promotion of two tenure track faculty, one of whom was a black male from Barbados, Dr. Ronald Baynes, a former colleague of plaintiff's, to counter any inference of discrimination. (Floyd Aff.

(Cont'd)

These actions run counter to an inference of race discrimination by Dr. Floyd. The University also submitted the sworn testimony of Dr. Riviere that plaintiff's race and national origin played no role in his dissatisfaction with plaintiffs conduct as an employee of the Center in 2000-01. (Riviere Aff. ¶¶ 11-13.) The additional fact that Dr. Riviere, hired, reappointed and supported plaintiff for promotion over the many years he worked at the Center run counter to any inference of discriminatory nonrenewal.

Plaintiffs argument on brief that the University's stated rationale is pretextual is limited to the following statements: "Defendant has offered conflicting statements about the plaintiff's termination. Plaintiff's evidence and Exhibits demonstrate that there are factual disputes and defendant's own statements support different treatment for plaintiff." (Pl.'s Resp. at 5.) Plaintiff offers absolutely no references or citations to support the foregoing statements. This rejoinder is clearly inadequate to rebut the University's articulated legitimate, nondiscriminatory reason for its conduct.[7]

(Cont'd)

¶ 12.) In the context of national origin discrimination, however, the court hesitates to conclude that a lack of discrimination against an individual from Brazil or Barbados allows any conclusions whatsoever with respect to possible discrimination against an individual from Nigeria. The hiring of a black, Ethiopian male may be more relevant but is not necessarily indicative of a lack of animosity toward Nigerians.

7. While the University has boldly characterized plaintiff's failure to sue any individual at the University, such as Dr. Floyd or Dr. Riviere, as "an implicit admission that he has no evidence

(Cont'd)

Appendix B

Despite the lack of pertinent argument in his brief, plaintiff responds to the claim that funding did not exist to support the renewal of his contract in his exhibits, including his own affidavit, by claiming that he had obtained the necessary funding through his grant proposal and alternatively, that the University could have provided him with bridge funding while he applied for and obtained further funding for his project. The University has produced three affidavits testifying to the typical use of bridge funding at the University, and each affiant affirmed that plaintiff did not fall into the category of faculty members to whom bridge funding is typically extended. (Riviere Rebuttal Aff. ¶ 6 (bridge funding applies only to faculty grant programs and is not provided for time limited appointments); Floyd Rebuttal Aff. ¶ 6 (same); Fletcher Aff. ¶¶ 12-13.) Plaintiff has not provided contradictory testimony.

With respect to plaintiff's allegation that he had secured his own funding for the '01-'02 academic year, the University explains that the funds plaintiff obtained were used to finance his salary from April through September 2001, the period of time he was not working for the Center on Center-related projects, and that the remainder was used to fund plaintiff as

---

(Cont'd)

that any NCSU individual has engaged in race or national origin discrimination," (Reply at 6), the court prefers to attribute plaintiff's failure to sue the named individuals to plaintiff's correct understanding of current Fourth Circuit law, which expressly provides that supervisors are not liable in their individual capacities for Title VII violations. See *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177, 181 (4th Cir. 1998) (supervisors are not liable in their individual capacities for Title IV violations).

a contractor from September through December 2001.[8] (Fletcher Aff. ¶ 12; Riviere Rebuttal Aff. ¶ 6. See also Def.'s Mm., Floyd Aff., Attach. 2 (Letter from Dr. Floyd to plaintiff outlining payments from USDA Agreement budget for plaintiff's salary between July and December 2001).)

Because plaintiff has not submitted evidence sufficient to raise a genuine issue of material fact as to the allegedly pretextual nature of the University's rationale for its non-renewal decision, the University's motion for summary judgment as to this discrimination claim will be allowed.

Motion to Strike

The University has submitted a motion to strike three "To Whom It May Concern" letters written by various individuals associated with the University and submitted by plaintiff in conjunction with his response to the University's

---

8. Plaintiff asserts Plaintiff asserts that the University still holds 50% of his grant money but has not offered any support for that statement. (Pl.'s Aff. ¶ 14.) Dr. Floyd testified by affidavit that, of the $65,000 plaintiff requested from the USDA for the period from 1 July 2001 through 30 June 2002, only $25,317 came from USDA to DPHP through the University's Office of Contracts and Grants (FAS Account 5-20138). See Pl.'s Resp., Ex. 12, exs. 25,27. Of that $25,317, the grant budget allocated $19,449 to plaintiff's salary and benefits. DPHP used a portion of the USDA funds to pay a portion of plaintiff's salary from April 2001 through September 2001. DPHP exhausted the remainder of those funds paying the amounts due plaintiff for work performed as a contractor between September and December 2001. (Floyd Rebuttal Aff. ¶ 4.) Plaintiff has not produced or projected any evidence to the contrary.

motion for summary judgment.[9] The University's motion is premised on the argument that the statements plaintiff has

---

9. Dr. Stacy Branch, an African-American female professor with the College of Agriculture and Life Sciences, Department of Environmental and Molecular Toxicology, submitted a letter describing nine years of allegedly discriminatory acts that ultimately led to her resignation from the University. Among other things, Branch discusses the idea of "bridge funding" and the fact that she learned of the existence of such finding "literally by accident." Branch does not convey that she needed bridge funding, that she applied for it or that she was denied bridge funding. Nor does her letter have anything at all to do with the College of Veterinary Medicine, the Center, Dr. Riviere, or Dr. Floyd.

Patricia Figgures, an African-American woman who worked at the Center under the supervision of Dr. Riviere as a temporary employee and later as a permanent Administrative Assistant, allegedly experienced sexual harassment from a Dr. Aronson and racial discrimination within the Center, and she claims that she was fired when she complained about Aronson's conduct. (Figgures Letter at 1.)

Cecil F. Brownie, a tenured full professor in the Department of Molecular Biomedical Sciences in the College of Veterinary Medicine and an African-American male, submitted his letter to describe "some perceived racially motivated experiences" he has had while a member of the University's faculty. None of the incidents described in his letter pertain to Drs. Riviere or Floyd. (Brownie Letter at 1-2.) Further, Brownie completed an affidavit submitted with the University's Reply, indicating that has "no first hand personal knowledge as to why the College of Veterinary Medicine did not reappoint [plaintiff]." (Brownie Aff. ¶ 3.) Brownie also explained that the "concern that I raised in my 1 October 2004 letter are unrelated to any actions or inactions by Dr. Jim Riviere or Dr. James Floyd. I have worked with Dr. Riviere for years and have submitted his nomination for the O. Max Gardner award." (Id. ¶ 4.) Brownie also noted that he had not heard any derogatory remarks on the basis of race or national origin made by Riviere, Floyd or Fletcher. (Id. ¶ 5.)

offered do not conform to the requirements of Federal Rule if Civil Procedure 56(e) regarding affidavits submitted in support of or in opposition to summary judgment. Plaintiff argues that the letters do meet the standards of Rule 56(e) because they are made based on personal knowledge, they set forth such facts as would be admissible in evidence, and that they show affirmatively that the authors are competent to testify as to the matters discussed therein. Plaintiff's argument that the letters would be admissible is based primarily on the fact that they were notarized and thus, acceptable under Federal Rule of Evidence 902(8) and N.C. Gen. Stat. § 10A-3.

It is evident from the letters themselves that they are notarized but that the authors did not swear or attest to the truthfulness of their contents. Despite the fact that the authors of the statements had their signatures witnessed by notaries public, the letters are not and do not comport to be affidavits, and the letters do not comply with the requirements of Rule 56(e). See *Chaiken v. VV Pub. Corp.*, 119 F.3d 1018, 1033 (2nd Cir. 1997) (refusing to allow plaintiff to rely on unsworn letters of "experts" to defeat summary judgment because letters did not meet requirements of Rule 56(e)), cert. denied, 522 U.S. 1149 (1998); *Barlow v. Connecticut*, 319 F.Supp.2d 250, 260 (D. Conn. 2004) ("Unsworn statements, letters addressed to litigants, and affidavits composed of hearsay and non-expert opinion evidence do not satisfy Rule 56(e) and must be disregarded."); *Rodriguez v. Lauren*, 77 F.Supp.2d 643, 647 n.10 (E.D. Pa. 1999) (declining to consider the contents of the unsworn statement from plaintiffs co-worker colaborating his claims of discrimination explaining that "[u]nsworn statements do not meet the

requirements of 'affidavits' and thus cannot be used to support motions for summary judgment or responses thereto, see *Small v. Lehman*, 98 F.3d 762, 764 n. 5 (3d Cir. 1996).").

Nor can the three statements qualify under 28 U.S.C. § 1746, which permits a court to accept unsworn statements if the person giving the statement subscribes to it in writing under penalty of perjury. An examination of the statements reveals that although Figgures, Brownie and Branch had their statements notarized, there is no indication that oaths were administered to any of the three individuals, or that their statements were given under penalty of perjury. See, e.g., *Mroz v. City of Tonawanda*, 999 F. Supp. 436, 458 (W.D.N.Y. 1998). Indeed, Brownie subsequently provided affidavit testimony indicating that he did not "take an oath or swear to the contents of [his] letter." (Brownie Aff. ¶ 2.)

While the court need not strike these documents, and thus will deny the University's motion to strike, the law is clear that plaintiff cannot rely on them and the court cannot consider them as evidence sufficient to create a genuine issue of material fact in opposition to the University's motion for summary judgment. Accordingly, the statements will be disregarded for purposes of the University's motion for summary judgment.

Appendix B

Conclusion

For the foregoing reasons, the University's motion for summary judgment is ALLOWED. The University's motion to strike is DENIED, but the court notes that the letters at issue in that motion were not considered for purposes of summary judgment This case is DISMISSED.

This 12 April 2005

s/ W. Earl Britt
W. EARL BRITT
Senior United States District Judge